No. 16,199

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES BURTON ING and
RAYMOND WRIGHT,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court, District of Alaska,
Third Division.

BRIEF FOR APPELLANTS.

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Appeal from the District Court, District of Alaska, Third Division.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

On October 29, 1957, the grand jury filed in the District Court for the District of Alaska, Third Judicial Division, an indictment charging James Burton Ing, Raymond Wright, Charles E. Smith, John Walker, Dewey Taylor, and Lemuel Ashley Williams, with forgery by uttering and publishing forged checks in violation of Section 65-6-1, A.C.L.A. 1949 (R. 3-33). Count I of the indictment read as follows:

"Count I.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and

Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud C. A. Peters, owner of the Fifth Avenue Cash Grocery, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9078

This check not good for more than sixty days.

Contract 1787—August 22, 1956.

Period Ended 8/19/56.

Pay to the Order of Wendell R. Ware.

Badge No. 1177.

Gross Earnings 236.00

Deductions

WT & FICA 26.20 A.U.C. 1.18 Alaska I.T. 3.15

B. and L. 28.00

Amount of Check $177.47.

The sum of $177 and 47 cts.

The First National Bank
of Anchorage

59-6 Anchorage, Alaska.

Morrison-Knudsen
Company, Inc.
By /s/ Guy M. King.

(Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.)

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged."

The remaining counts of the indictment were similar, charging appellants Ing and Wright in each count, together with one of the other defendants.

The defendants Walker, Taylor, and Williams had entered pleas of guilty prior to trial, and Walker and Taylor testified for the Government. They had not yet been sentenced.

The trial of Ing, Wright, and Smith was completed by the filing of the jury verdicts on February 28, 1959. Appellant Wright was convicted on Counts VI through XVIII of the indictment, inclusive, and acquitted of the remainder of the charges (R. 35-37). Appellant Ing was convicted of all twenty counts (R. 34-35). Smith was found guilty on four counts, and filed a separate appeal which has already been decided by this Court.

On March 5, 1958, Ing was sentenced to 15 years on each of the twenty counts of which he had been convicted, the sentences to run concurrently, and Wright was sentenced to serve 12 years on each of the thirteen counts of which he had been convicted, his sentences also to run concurrently (R. 37-40).

The District Court had jurisdiction of the indictment and of the trial by virtue of the provisions of Sections 53-1-1, 53-2-1, and 65-6-1 of the Alaska Compiled Laws Annotated, 1949.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of the provisions of Sections 1291 and 1294, Chapter 83, Title 25, U.S.C., and Section 14 of Public Law 85-508, 72 Stat. 339.

STATEMENT OF THE CASE.

Claude Kenneth Brownfield, a resident of Chicago, Illinois, was the chief witness against the appellant Ing. Brownfield testified that he first became acquainted with Ing in the Spring of 1956 in Chicago (R. 476). Ing stated that he was "trying to get something lined up in the form of checks in Alaska and would I be interested in taking part in it," Brownfield testified (R. 478). Later, Brownfield received several letters from Ing discussing a plan to forge and pass checks in Alaska. Brownfield testified that he destroyed these letters (R. 479-480).

Late in August, 1956, Brownfield received a box containing a check protector, two birth certificates, and approximately 400 checks that appeared to be payroll checks drawn on the Morrison-Knudsen Company (R. 480-481). He stated that the checks were already signed by one Guy King, but that the rest of the checks were blank. Brownfield, together with two confederates, Eckley and Hausam, then brought the checks to Fairbanks, and, according to Brownfield, delivered the contents of the box in a suitcase to Ing at the Fairbanks Country Club (R. 481-482). Ing explained to Brownfield that arrangements had been made to pass checks in both Fairbanks and Anchorage

over the long Labor Day week-end, after which the passers would "catch planes out of Alaska" (R. 483). Ing and Brownfield typed in names and amounts on the checks and jointly ran them through the check protector (R. 484). Ing furnished Brownfield with identification (R. 486), paid for his transportation to Alaska (R. 489), and Brownfield commenced to pass checks on schedule (R. 505). He was promptly arrested, and was convicted at Fairbanks in December of 1956 (R. 505, 511), and was brought to this trial from the Federal Penitentiary at McNeill Island, Washington in order to testify (R. 542). At the time of this trial, Brownfield was under indictment at Fairbanks on four counts of forgery and one count as an habitual criminal (R. 470, 538, 543, 546, 548). Brownfield did not mention the appellant Wright in his testimony.

Upon his return to the penitentiary, Brownfield recanted his testimony against Ing, both in letters (R. 44-45) and affidavits. After hearing repeated arguments for a new trial based on Brownfield's recantations, the trial court entered a minute order indicating "that it would not grant motion for new trial based on the recantations of the witness Claude Brownfield, and that the matter should be disposed of by the Ninth Circuit Court of Appeals" (R. 54).

The defendant John Walker, a resident of Seattle, had already entered pleas of guilty to six counts of the indictment prior to his testimony (R. 414). Walker testified that he knew both Ing and Wright, and that Wright discussed with him in August, 1956

"trying to make some big money" (R. 415). Walker testified that he never had any discussions with Ing (R. 415), but he testified that Ing took his, Walker's, picture with a Polaroid camera about the 30th of August, and pasted it on an identification card, which Walker later used in passing checks (R. 417). Walker testified that he and Taylor accompanied Wright to Anchorage on the Friday before the Labor Day weekend (R. 418). He testified in detail concerning his part in passing a number of checks in Anchorage (R. 419-424), and then testified that he, Taylor and Wright drove back to Fairbanks (R. 425-427). He testified that a number of items which they had purchased with the proceeds of the forged checks were unloaded at Wright's residence (R. 427-428). Walker had been convicted of several misdemeanors (R. 429-430), and was awaiting sentence on six counts of forgery at the time of his testimony (R. 432).

Dewey Taylor, a defendant who had already entered pleas of guilty to several counts of the indictment (R. 128-129), testified in some detail as to his acquaintanceship with Wright, the agreement to pass checks, and the trip from Fairbanks to Anchorage and back in the company of Walker and Wright (R. 65-80). He identified a number of the checks and admitted cashing them at various places in Anchorage (R. 97-104). Taylor did not mention the appellant Ing, except to state that he knew him (R. 65).

Aside from the testimony of these alleged accomplices, the only testimony concerning either of the appellants was as follows:

George W. Hooker, Assistant Manager of the Westward Inn at Anchorage, testified that James B. Ing and his wife were guests at the hotel on August 31 through September 2, 1956, and that he made two local phone calls on August 31 and one long distance call, upon which the toll charge was $2.50 (R. 455-457).

Eli Williams, a resident of Anchorage, testified that Raymond Wright stayed at his home over the Labor Day week-end of 1956 (R. 371). Williams testified that Wright often visited him and that he observed "nothing unusual" about this particular visit (R. 374).

Ernest Yokely, brought to Court from the Anchorage jail, and awaiting prosecution on a charge of attempting to escape (R. 559-560), testified that he had once been at the home of Eli Williams when Raymond Wright, John Walker and Dewey Taylor were also present (R. 556). He could not establish the date of this occurrence but estimated that it was "about a year ago" (R. 556). This would have been approximately February, 1957 (R. 557).

At the close of the Government's evidence, both appellants moved for judgments of acquittal, and the Court reserved decision (R. 564-565). Following argument, both appellants rested without presenting evidence, and again moved for judgments of acquittal (Smith Record 268).

Following the verdicts of the jury, judgments, and sentences, these appeals followed.

STATEMENT OF POINTS.

For appellant Ing:

1. The Court erred in denying defendant's motions to dismiss the indictment.

2. The Court erred in denying defendant's motion for judgment of acquittal, made at the close of the evidence offered by the Government.

3. The Court erred in denying defendant's renewed motion for judgment of acquittal, made at the close of all the evidence.

4. The Court erred in refusing to give the instruction requested by the defendant, that the witness John Walker and the witness Claude Brownfield were accomplices.

5. The Court erred in refusing to give the instruction requested by the defendant that the witness John Walker was an accomplice.

6. The Court erred in refusing to instruct the jury as requested that the witness Claude Brownfield was an accomplice.

7. The Court erred in instructing the jury as follows:

"This indictment is a mere allegation of the charges against the defendants and is not, in itself, any evidence of guilt, and no juror should permit himself to be influenced against the defendants because of the fact that an indictment has been returned against the defendants.

"To this indictment the defendants, James Burton Ing, Raymond Wright, and Charles E. Smith, have

pleaded not guilty, which pleas are a denial of the charges and put in issue every material allegation of the indictment.

"It therefore, becomes the duty, and it is incumbent upon the Government to prove every material element of the charges contained in the indictment to your satisfaction beyond a reasonable doubt.

"The exact date of the commission of the crime charged in the indictment is not material provided the crime was committed within five years prior to the date of the indictment. It is sufficient if you find the crime so charged was committed on any date within five years prior to the date of the indictment.

"The law presumes every person charged with crime to be innocent. This presumption of innocence remains with the defendants throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendants are guilty beyond a reasonable doubt," to which objection was made and exception allowed.

8. The Court erred in instructing the jury as follows:

"In this case, the Government relies in part upon the testimony of admitted accomplices.

"You are instructed that an accomplice is one, who, being of mature age and in possession of his natural faculties, cooperates with or aids or assists another in the commission of a crime.

"With respect to such testimony, the laws of Alaska provide as follows:

" 'A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.'

"The provision of Alaska law which is quoted means that the corroborating evidence required to be given before conviction can be had must, in itself, and independent of all accomplice testimony, tend to connect the defendants with the commission of the crimes charged against them, and must tend to show not only that the crimes have been committed, but that the defendants were implicated in them. Corroborating testimony need not be direct; it may be circumstantial; and, whether direct or circumstantial, if it corroborated the testimony of an accomplice in a material particular and tends to connect the defendants with the crimes charged, it is sufficient to meet the requirements of the statute and support a conviction.

"This law does not mean that the corroborative evidence alone must be sufficient to justify conviction, but it does require that unless in your judgment the corroborative evidence alone and by itself tends to connect the defendants with the crimes charged, the defendants should be acquitted, no matter how convincing the accomplice testimony may be.

"If you find that the corroborative evidence alone, if any, does tend to connect the defendants, or any of them, with the commission of the crimes charged

against them, then you should consider all of the evidence against such defendant or defendants, including all accomplice testimony, and if all of the evidence, including both that of the accomplices and that of the corroborative testimony, convinces you beyond a reasonable doubt of the guilt of the defendants, or any of them, you should render a verdict accordingly; otherwise the defendants, or any of them, should be acquitted.

"Section 58-5-1, Compiled Laws of Alaska, 1949, provides in part as follows:

" 'That the testimony of an accomplice ought to be viewed with distrust.'

"You are accordingly instructed that the testimony of the government witnesses, self-confessed accomplices in the commission of the crimes charged in the indictment in the case now on trial before you, ought to be viewed with distrust,"

to which objection was made and exception allowed.

9. The Court erred in instructing the jury as follows:

"You are instructed that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such. However, one who is merely present but does nothing to aid, assist or abet or induce the other to commit the crime is not guilty. It must be shown that he actually participated

in its commission from which it follows that if the evidence warrants you may find one of the defendants guilty and the other not guilty. Therefore, if you find from the evidence beyond a reasonable doubt that the defendants, acting either in concert or in pursuance of a previous understanding or common design, committed the crime charged in the indictment, each would be guilty as principal regardless of which of them uttered and published the checks in question, for it is immaterial to what degree any one of them participated in the commission of the crime so long as you find beyond a reasonable doubt that any one knowingly aided, abetted or assisted the others, or any of the others, in its commission,"

to which objection was made and exception allowed.

10. The verdict is contrary to the weight of the evidence.

11. The verdict is not supported by substantial evidence.

12. The Court erred in failing to grant the defendant's motion for a new trial.

13. Other manifest error appearing of record, to which objection was taken and exception reserved.

For appellant Wright:

1. Insufficiency of the evidence to establish the charge or to support the verdict and/or judgment on the charge contained in the indictment.

2. That the District Court and the Judge thereof erred in denying appellant's motion made at the con-

clusion of all the evidence in the case for a judgment of acquittal.

3. That the verdict is contrary to the weight of the evidence.

4. That the verdict is not supported by substantial evidence.

5. That in the absence of any corroborating testimony other than that furnished by the accomplices, no question of fact remained to be submitted to the jury.

6. That Section 66-13-59 of the Alaska Compiled Laws, Annotated, is controlling, and that in the absence of independent corroboration was sufficiently compelling to grant the motion for judgment of acquittal.

SUPPLEMENTAL STATEMENT OF ADDITIONAL POINT.

For both appellants:

1. The United States Attorney committed reversible error in commenting on the failure of the appellants to take the witness stand, and the trial Court erred in failing to properly instruct the jury after the United States Attorney's comments.

SUMMARY OF ARGUMENT.

The record of this trial is somewhat lengthy (some 570 pages), but the great bulk of the evidence related

to the circumstances of the passing of the various checks named in the indictment, and the identification of those checks and the fact that they were forged. The only evidence tending to implicate either of these appellants with the commission of these crimes, came from the lips of accomplices. This accomplice testimony was completely uncorroborated. Therefore, we contend that the Court should have granted judgments of acquittal to each of the appellants.

There were a number of other errors committed by the Court in the instructions given and refused, and the verdicts are contrary to the weight of the evidence. However, these errors are all included, in effect, within the boundaries of the basic error committed by refusing to grant judgments of acquittal.

The United States Attorney clearly erred in commenting on the failure of the appellants to take the witness stand. The court made no attempt to avoid this error by proper instructions to the jury.

ARGUMENT.

POINT 1. THE TESTIMONY OF THE ACCOMPLICES WAS COMPLETELY UNCORROBORATED; THEREFORE THE COURT ERRED IN REFUSING TO GRANT MOTIONS FOR JUDGMENTS OF ACQUITTAL.

All of the testimony against the appellants came from the lips of accomplices. The testimony of these witnesses has been reviewed in some detail earlier in this brief. The appellants contend that there was no evidence whatsoever corroborating these accomplice

witnesses, and no evidence tending to connect either of the appellants with the commission of these crimes, other than the accomplice testimony. The Government, on the other hand, maintains that the testimony of the accomplices is corroborated by the following facts: (1) That Ing stayed at the Westward Inn at Anchorage, over the Labor Day week-end of 1956; (2) That Wright visited a friend, Eli Williams, at Anchorage, over the same Labor Day week-end; (3) That two documents, a driver's license and an identification card, produced during the testimony of the accomplice witness Brownfield, were given to him by Ing, according to Brownfield. We will consider these points in order.

A. Presence in Anchorage.

The statutes here involved read as follows:

> "Section 58-5-1, ACLA 1949. The jury . . . are, however, to be instructed by the court on all proper occasions:
>
> * * *
>
> Fourth. That the testimony of an accomplice ought to be viewed with distrust and the oral admissions of a party with caution. . . ."
>
> "Section 66-13-59, ACLA 1949. Corroboration of testimony of accomplice. That a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission."

These statutes came, as do many Alaska laws, from Oregon. In *State v. Odell* (1880), 8 Ore. 30, the Supreme Court of Oregon said:

> "The fact of the presence of the defendant Odell in the same town at the time of the commission of the offense, or immediately before or afterwards, is not sufficient evidence to connect the defendant Odell with the commission of the crime charged in the indictment."

Nearly sixty years later, in *State v. Reynolds* (Ore. 1939), 86 P. 2d 413, the Court reiterated and repeated the same principle. In the *Reynolds* case, the Court pointed out the policy of the law:

> "The reason why it is the policy of our law that a defendant may not be convicted upon the testimony of an accomplice unless there is other evidence which, taken by itself and without regard to the testimony of the accomplice, tends to connect the defendant with the commission of the crime is because, as has often been said, accomplice testimony comes from a corrupt and polluted source, and any other rule would expose to the peril of unjust conviction innocent men whom the accomplice might find it to his interest to implicate in his crime." (P. 422).

Certainly the accomplice testimony here came from such corrupt and polluted sources. The witness Brownfield has already been convicted of larceny, manslaughter and forgery, and was then awaiting trial on four additional counts of forgery and a count charging him as an habitual criminal (R. 511). The witness Walker had entered a plea of guilty to six

counts of forgery, and was awaiting sentence at the time of his testimony (R. 414); he had previously been convicted of numerous misdemeanors (R. 430), and testified that he had made up his mind to plead guilty when he found out that ". . . there was no other way I could possibly get out of this unless I did" (R. 435). The witness Dewey Taylor, an itinerant musician (R. 116), had plead guilty to seven counts of forgery and was awaiting sentence at the time of his testimony (R. 65).

The Government suggests that the fact that the defendant Ing and his wife stayed at the Westward Inn at Anchorage over a portion of the Labor Day week-end, and that the appellant Wright visited a friend in Anchorage over the same week-end, tends to connect these appellants with the commission of the crimes charged.

It takes a long stretch of the imagination to allege that the mere presence of a defendant in a city where the crime is committed is an incriminating circumstance. Repeatedly the Courts have rejected any such suggestion.

In *State v. Jones* (Mont., 1933), 26 P. 2d 341, the defendant was charged with robbery. An accomplice testified in detail against him in a manner reminiscent of the witness Brownfield here; as corroboration the State offered evidence that the defendant was actually present at the scene of the conspiracy, and later in the vicinity of the offense, in addition to other allegedly corroborating circumstances. The Court held:

> "The presence of the defendant at or near the place where a conspiracy is said to have been formed, at or about the time of its forming, if formed at all, with any motive the defendant may be shown to have had for the commission of the crime may be considered in this connection. . . .
>
> But the mere showing of opportunity to have joined in the commission of the offense, or evidence which raises a suspicion that the defendant was implicated, is not enough . . . , and where the facts and circumstances relied upon for corroboration are as consistent with innocence as with guilt, a conviction on the testimony of an alleged accomplice must be set aside. . . ."

After further reviewing the evidence, the Court went on to point out that:

> "The independent testimony does no more than show opportunity for the defendant to have conspired to commit the crime and to raise a suspicion that he did so, and, without further corroboration which in fact tends to connect him with the commission of the offense, the judgment, based on the testimony of Smith, the accomplice if Jones is guilty, cannot stand." (P. 345).

We urge the Court to review the facts of this case, as we believe it presents a much stronger case of corroboration than is under consideration in the present instance; nevertheless, the Supreme Court of Montana found the evidence wholly insufficient.

In *Hatton v. Commonwealth* (Ky., 1934), 68 S.W. 2d 780, the defendant had been convicted of housebreaking upon the direct testimony of an alleged

accomplice, and testimony of two other witnesses that he was seen in the vicinity of the house in question on the day of the larceny. The Court pointed out that such evidence as the presence of the defendant in the area would show no more than an opportunity to commit the crime, and held that the evidence was insufficient to connect the defendant with the offense. In *Cornett v. State* (Okla., 1929), 274 P. 676, the defendant was charged with bank robbery. Two alleged accomplices testified in detail concerning the commission of the crime and the participation of the defendant in planning the operation. For corroboration, the State depended upon the testimony of two witnesses that the defendant was seen near the scene of the crime on the day of the robbery. Said the Court (in a syllabus by the Court):

> "Where witnesses for the State admit they participated in the robbery of a bank and attempt to implicate the defendant in the robbery, their testimony is not sufficiently corroborated by merely showing that the defendant was near the scene of the robbery. Corroboration of the accomplices must show more than a commission of the offense. Some fact or circumstance implicating the accused in the perpetration of the crime must be shown independently of the testimony of the accomplices."

So, too, in *Pate v. State* (Tex., 1922), 239 S.W. 967, the defendant was accused of robbery, and an accomplice testified against him in detail. Evidence was offered to corroborate the accomplice to the effect that the defendant had been seen in the town where the

crime was committed on the afternoon of the robbery. Reversing the judgment of conviction, the Court said:

> "We are unable to give our assent to the incarceration of a citizen of this State in the penitentiary upon corroborative evidence of no greater strength than appears in the present case." (P. 968).

It should be obvious that, excluding the accomplice evidence in the present case, the mere presence of the defendant Ing and his wife at the Westward Inn during the period of time when the crimes were committed, and the visit of Wright to a friend in Anchorage, would no more tend to incriminate either Ing or Wright than it would any other resident of Anchorage, or any other visitor to Anchorage over the Labor Day week-end.

Repeatedly, the State Supreme Courts, across the Nation, have held that the mere presence of the defendant in the town where the crime was committed, or even his appearance in the vicinity where the crime was committed, is not corroborating evidence tending to connect the defendant with the commission of the crime; such evidence may raise a "grave suspicion" of the accused's guilt, or may show that he had an "opportunity" to commit the crime. But it takes more than suspicion and opportunity to meet the requirements of the law regarding corroboration. See for example, *State v. Lay* (Utah, 1910), 110 P. 986 (occupancy of an adjacent hotel room as corroboration of adultery; conviction reversed); *People v. Colmey* (N.Y. 1906), 101 N.Y.S. 1016 (Defendant seen in

offices where accomplice testified he had attempted to pass a forged stock certificate; conviction reversed); *State v. Lane* (Utah, 1954), 277 P. 2d 820 (Forgery conviction on accomplice testimony, and corroboration of presence in the area and other circumstances; conviction reversed).

B. The Driver's License and the Identification Card.

During the testimony of the witness Brownfield, a driver's license and an identification card were produced and offered in evidence, which Brownfield testified were given to him by Ing (R. 486-488). Do these documents, standing alone, tend to connect the defendant with the commission of the crime? Clearly not. The driver's license and the identification card are not independent facts; they are an integral part of the testimony of the accomplice Brownfield. And any tendency which they might have to implicate the defendant Ing, comes only from the testimony of Brownfield. Standing alone they are meaningless. So-called corroborative evidence is insufficient if it "takes direction and tends to connect the appellants with the offense charged only when interpreted by and when read in conjunction with the testimony of the admitted accomplice." *People v. Hoyt* (Cal., 1942), 125 P. 2d 29-32.

In the case of *State v. Duncan* (Ia., 1912), 138 N.W. 913, the accomplice witness testified as to the defendant's participation in a burglary, and further testified that a particular revolver which had been taken during the commission of the crime had been

placed by the defendant in a certain vault. The prosecution insisted that finding the revolver in the place where the accomplice testified the defendant placed it, tended to corroborate the testimony of the accomplice and connect the defendant with the commission of the crime. The Court said:

> "This corroboration must be by testimony other than that which comes from the accomplice, and it must tend to connect the defendant with the commission of the offense. It is manifest that the finding of the revolver at the place where the accomplice, Fowler, said defendant put it, does not tend to corroborate the witness, for he may have put the revolver there himself and concocted the story about the defendant telling him that the defendant placed it there." (P. 914).

So here, Brownfield could have obtained these items anywhere from anyone; nothing intrinsic to either would connect them with Ing.

In *State v. Brown* (Ia., 1909), 121 N.W. 513, the accomplice witness testified that certain unsigned letters received by her had been written by the defendant, and the letters were therefore offered as corroborating her testimony. The Court held that the letters alone supplied no corroboration of the testimony of the accomplice; only if they were connected with the defendant by other independent evidence could they be considered as any evidence of corroboration. In the *Brown* case there was such other evidence, consisting of a handwriting comparison. In the present case there was no other evidence concern-

ing either the driver's license or the identification card which in any way tended to identify either or connect either with the defendant Ing. There was nothing but the testimony of the accomplice. See also, *People v. Compton* (Cal., 1899), 56 P. 44.

A multitude of similar cases could be cited, but the general rule is clear: An item of evidence does not "tend to connect the defendant with the commission of the crime," where it comes from and depends entirely on the story of the accomplice, and does not in and of itself tend to connect the defendant with the commission of the crime.

The *weight* of corroborating evidence is a question for the jury. However, the *presence* of corroborating evidence and its sufficiency to go to the jury, or to constitute corroboration, is definitely a question of law for the Court, and it would be reversible error for the Court to submit a case to the jury where there actually was no corroborating evidence to support the testimony of the accomplice witnesses. *United States v. Murphy* (D.C., N.Y., 1918), 253 F. 404.

In *People v. White* (Cal., 1939), 94 P. 2d 617, 621, the Court said:

> "The corroboration necessary to support the testimony of an accomplice must be of some fact tending to prove the guilt of the accused. It is not sufficient if it is equivocal or uncertain in character and must be such that legitimately tends to connect the defendant with the crime. It must be of a substantive character, must be inconsistent with the innocence of the accused, and must do more than raise a suspicion of guilt."

If we apply these principles to the present case, it is difficult to see how the conviction of the appellants can properly be sustained. Here we have none of the evidence which is ordinarily produced in such cases to corroborate the testimony of the accomplice. The appellants were not found in possession of the typewriter which was allegedly used to forge the checks, nor the check protector which was allegedly used to fill them out, nor any other item of evidence of any kind. No handwriting expert was produced to testify as to the handwriting of either of the appellants. No witness, other than an accomplice, testified that either Ing or Wright ever saw the checks in question or handled them in any way. Other than the testimony of the accomplices, no witness was produced who ever saw either of the appellants with any of the accomplices or other participants in the crime, either in Chicago, Fairbanks, or Anchorage. No witness was produced to connect any of the items of physical evidence, or exhibits in the case, with the appellants, other than the accomplices. No witness testified that either Ing or Wright ever received any of the proceeds of the swindle, or had any part in the distribution of the money obtained. No witness was produced to testify that either Ing or Wright were in need of money, or had any other motive to participate in such a proceeding. In short, although *thirty witnesses* testified on behalf of the Government, not one word of testimony, and not one item of evidence, was produced tending to connect either of the appellants with the commission of these crimes, other than the testimony of the admitted accomplices.

C. The Witness Brownfield Was an Accomplice.

At previous stages of this case, the Government has contended that the witness Claude Brownfield was not an accomplice, although he admitted his participation in detail. We submit that the record is clear on this point, and that only one conclusion could be reached: That Brownfield was an accomplice.

Brownfield testified that he transported the checks which were later used in Anchorage, in a package containing other items, from Chicago, Illinois, to Fairbanks, Alaska, shortly before the checks were passed (R. 481). He further testified that, after arriving in Fairbanks, he actively participated in filling out the checks on a typewriter, and that he and defendant Ing then ran the checks through a check protector (R. 484). He admitted being told that a portion of the checks were to be cashed in Anchorage. The Government contends that Brownfield had little knowledge of the scheme to forge and pass checks in Alaska, that he did not actually participate in the forgery of the checks passed in Anchorage, and that his activities in Fairbanks amounted to no more than "guilty knowledge" of the crimes allegedly committed in Anchorage. However, this version of the facts does not correspond with the testimony of Brownfield as set forth in the record. Actually, according to the undisputed testimony, Brownfield transported *all* of the checks to Alaska from Chicago, together with the check protector (R. 481, 485). He did this knowing full well of the essential details of the scheme to pass the checks over the Labor Day week-end (R. 478-80,

482). According to his testimony, he and Ing filled out *all* the checks on the typewriter, including those passed in Fairbanks and those passed in Anchorage (R. 484). He drew no distinction between those checks used in Fairbanks and those to be used in Anchorage. Again, according to his testimony, he and Ing ran *all* of the checks through the check protector, an essential part of preparing the checks for passing (R. 484). Again, to reiterate, Brownfield carried on these activities knowing full well of the scheme to pass a portion of the checks in Anchorage (R. 482-3).

The essential fact element is that Brownfield knew and consented to the entire scheme. He was a willing participant. There was no dispute whatever in the testimony, and it is crystal clear from the facts that Brownfield was an accomplice of the appellants in the scheme to pass checks in the City of Anchorage, if they were involved in the scheme.

Section 66-9-23, A.C.L.A. 1949, reads as follows:

> "That the distinction between an accessory before the fact and a principal, and between principals in the first and second degree in cases of felony, is abrogated, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, must be indicted, tried and punished as principals, as in the case of a misdemeanor."

Section 65-3-2, A.C.L.A. 1949, reads as follows:

> "That all persons concerned in the commission of a crime, whether it be felony or misdemeanor,

> and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such."

Reduced to its simplest terms, the question involved at this point becomes: Is a person who actively participates in the commission of a forgery, knowing the general scheme under which the instruments are to be forged and passed, an accomplice of those who later pass and utter the forged documents? Under these Alaska statutes, it is difficult to see how the Government could maintain that Brownfield is not an accomplice, as these sections clearly define as a principal anyone who aids and abets in the commission of the crime, although not present. Certainly, there would seem to be no question but that Brownfield could have been indicted as a principal under the language of these statutes, for his act in knowingly transporting the checks to the Territory of Alaska, if he had done nothing else. He clearly identified the very checks in evidence at the trial, as checks which he had transported to the territory of Alaska (R. 490-491).

As to the meaning of the term "aiding and abetting" in this connection, the Supreme Court of the United States said in *Nye and Nissen v. U.S.* (1949), 336 U.S. 613:

> "Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy. . . . Aiding and abetting rests on a broader basis; it states a rule of

> criminal responsibility for acts which one assists another in performing." (P. 620).

The statute under which the appellants were charged with forgery, Section 65-6-1, A.C.L.A. 1949, reads as follows:

> "That if any person shall, with intent to injure or defraud anyone, falsely make, alter, forge, counterfeit, print, or photograph any . . . , or check or money, . . . ; or shall, with such intent, knowingly utter or publish as true and genuine any such false, altered, forged, counterfeited, falsely printed, or photographed record, writing, instrument, or matter whatsoever, such person, upon conviction thereof, shall be punished, . . .".

Thus, in Alaska, the offenses of forging an instrument, and passing or uttering the instrument, are covered by the same statute. In *Lett v. United States* (C.C.A. 8th, 1926), 15 F. 2d 686, the question was whether or not the purchaser of narcotics is an accomplice of the seller, the purchaser herself being guilty of possession. The Court held that the purchaser was an accomplice, quoting the language of *Egan v. United States* (C.A., D.C., 1923), 287 F. 958, and pointing out that:

> "Not only was the witness Josephine West herself guilty of an offense, amounting to felony, against this same statute, but by her act of purchase she aided, assisted, and encouraged plaintiff in error in the commission of a crime; she was therefore an accomplice within the definition of that term." (P. 689).

In *Preston v. State* (Tex., 1898), 48 S.W. 581, the defendant was charged with uttering a forged deed by tendering the deed to the County Clerk for recordation. Among the witnesses against the defendant was the Notary Public who had attested the signature on the deed several months before, and there was conflicting evidence as to whether or not the Notary Public was an accessory to the forgery. The Court pointed out the distinction between the crime of forgery and the crime of uttering and passing. After considering the evidence, the Court held that the parties to the forgery were accomplices of the party uttering the deed, and said:

> "While it is true that Burke and Nicholson did not participate in uttering said alleged forged deed, and were not particeps criminis in that offense, yet we think the charge as given by the court was merely intended to characterize them as accomplices under the statute covering the testimony of accomplices. We believe, however, that it would have been better for the court to have instructed the jury, if they believed that said parties participated in forging the deed, which was alleged to have been subsequently uttered by appellant, that they were, in contemplation of our statutes with reference to accomplices' testimony, accomplices, and that their testimony required corroboration, and, in the absence of corroborating testimony, no conviction could be had of appellant on the charge of uttering said forged instrument."

To the same effect is *People v. Menne* (Cal., 1935), 41 P. 2d 383, and *People v. Warden* (N.Y., 1953), 124 N.Y.S. 2d 131.

A very clear discussion of the question of whether the forger is the accomplice of the passer occurs in *State v. Phillips* (Mont., 1953), 264 P. 2d 1009, where the defendant was charged with passing and uttering a state warrant for a gasoline tax refund containing a false and forged endorsement, made by another person. Said the Court:

> "The relation between the forger and one passing the instrument knowing it to contain a forged endorsement is analogous to that between a thief and one receiving the property knowing it to have been stolen. It has been held that one who steals property is not an accomplice of one who receives the property knowing it to have been stolen *unless the thief and the receiver act in concert in advance of the larceny,* because they are separate and distinct crimes. . . . That same principle governs this case." (1014-15, Emphasis supplied).

Applying these principles to the facts of the instant case, it is clear that Brownfield was and is an accomplice. According to his own testimony he was fully aware of the entire scheme to forge and pass these checks, including the fact that some of them would be uttered in Anchorage. He did his work knowing and consenting to the activities which were to occur. As to the analogy which the Montana Court drew in the *Phillips* case between the crime of forgery and the crime of uttering, as compared to the crime of larceny and the crime of receipt of stolen property, this Court has already spoken on that subject. In the case of *Stephenson v. United States* (C.A. 9th, 1954), 211 F. 2d 702, 14 Alaska 603, the Court pointed out:

> "The usual test to be applied in determining whether the thief is an accomplice is whether the thief could be convicted of the identical crime for which the defendant is being prosecuted. The reason underlying the general rule is that larceny and receiving stolen property are separate crimes, and since the thief cannot be convicted of receiving stolen property from himself, he is not an accomplice."

However, the Court went on to say:

> "To the general rule, however, there is increasing recognition of an exception to the effect that where the thief and the receiver of stolen property entered into an agreement prior to the larceny for one to steal and the other to receive, the thief is an accomplice of the receiver and vice versa. . . . The exception is based on the distinction between one who is an accessory both before and after the fact. The theory is that the previous arrangement between the thief and receiver amounts in effect to a conspiracy for both the theft and receipt of the stolen property, under such circumstances the usual test for determining an accomplice is met, since the thief and receiver can be prosecuted for both the theft and receipt of stolen property."

So, in the present case, where the understanding admitted by Brownfield covered both the forging and the contemplated passing of the checks in question, it would seem clear that Brownfield was an active participant in the forgery and clearly an accessory before the fact of the passing. An accessory before the fact, being guilty as a principal under the pro-

visions of the Alaska laws quoted above, Brownfield was clearly an accomplice and the court should so have instructed. In fact, the evidence being clear and uncontradicted, it was reversible error to refuse to instruct that the witness Brownfield was an accomplice, as a matter of law. *People v. Swoape* (Cal., 1925), 242 P. 1067; *People v. Black* (Cal., 1941), 113 P. 2d 746, 755; *People v. Elbroch* (N.Y., 1937), 294 N.Y.S. 961; *State v. Carr* (Ore., 1895), 42 P. 215; *Ripley v. State* (Tenn., 1950), 227 S.W. 2d 26.

And, there being a total absence of corroboration, it was the duty of the Court to grant motions for judgment of acquittal.

POINT 2. THE UNITED STATES ATTORNEY ERRED IN COMMENTING ON THE FAILURE OF THE APPELLANTS TO TAKE THE WITNESS STAND, AND THE COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY CONCERNING THE COMMENT.

1. At Page 271 of the Smith transcript, the following occurred during final argument by the United States Attorney:

> "Now, there's also much innuendo about the reliability of the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government . . .

Mr. Kay. I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right the defendant may have.

The Court. Well—

Mr. Plummer. I didn't mention anybody, except why didn't they put on a defense?

The Court. That is correct. Objection overruled. If it had referred to an individual, then I would concur, Mr. Kay.

Mr. Kay. They refer to the three individuals at this counsel table and no one else.

The Court. Of course, that is true.

Mr. Plummer. I didn't say . . . may counsel approach the bench a moment?

The Court. I don't think it is necessary, counsel. Let's proceed.

Mr. Plummer. Fine. Now, also, I think . . ."

The authorities on this point indicate that while most Courts recognize the rule that the prosecuting attorney shall not comment on the failure of a defendant to take the witness stand on his own behalf, and refer to such comments as "gross error", nevertheless in the cases reported and examined, the decisions have often found some reason to condone such alleged objectionable remarks; generally, condonation is based on the ground that defense counsel provoked the objectionable comments, or because of the particular peculiar facts of the case under consideration. Certainly there was no provocation in the instant proceeding, and we submit that there were no peculiar facts rendering these comments unobjectionable.

In *Wilson v. U.S.* (1893), 149 U.S. 60, the Prosecuting Attorney in his enthusiasm said:

> "If I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify as to my character, but I will go on the stand, and hold up my hand before high heaven, and testify to my innocence of that crime." (66).

The above comments were held to be a violation of the defendant's constitutional rights. On the other hand, in *Jackson v. U.S.* (C.C.A. 9th, 1900), 102 F. 473, 487, the comment, "Why didn't the defendant put a sworn witness on the stand . . .", was held not to be construed as a comment on defendant's failure to testify.

In this case, the United States Attorney said, "Why didn't they put on some evidence? Why didn't they put some evidence on?" If these comments stood alone, very probably they would not necessarily be construed as a violation of the constitutional rights of the defendant. However, these remarks were interrupted by an objection, since we felt that we could possibly expect additional and more pointed comments on the subject if the United States Attorney continued. Our only alternative was to call the attention of the Court to this line of argument in the hope that it would be stopped before reversible error was committed. My objection was:

> "Mr. Kay. I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right the defendant may have."

The court commenced to respond, but the United States Attorney interrupted the possible ruling to say:

> "Mr. Plummer. I didn't mention *anybody,* except why didn't *they* put on a defense?" (Emphasis supplied).

Thus, the United States Attorney pointed out to the Court, and the jury, that no particular person had been mentioned by name. But, instead of simply overruling the objection, the Court stated:

> "The Court. That is correct. Objection overruled. If it had referred to an *individual,* then I would concur, Mr. Kay." (Emphasis supplied).

Now, the court has joined with the United States Attorney in pointing out to counsel, and to the jury, that no individual was named by the United States Attorney in his argument, but that if he had mentioned an individual, then the Court would concur with Mr. Kay. Instead of just overruling the objection, the Court has explained in the presence of the jury the actual limits of the rule. Counsel for appellants then responded:

> "Mr. Kay. They refer to the three individuals at this counsel table and no one else."

This comment was obviously provoked by the Court in using the word "individual" in the first place, and we submit this represented the ultimate that we could do under the circumstances to point out any possible error to the Court. The Court then indicates, again in the presence of the jury, that the United States

Attorney had been, in fact, referring to the three individuals at the table of defendant's counsel, by saying:

"The Court. Of course, that is true."

At this point, we submit that reversible error had been committed, and the error was possibly irretrievable. If it would be error for the prosecuting attorney to make such a comment, it would be even more prejudicial to the appellants for the trial Court to join in the comment. However, the Court made no effort to correct the situation by an instruction to the jury that this colloquy should be ignored, nor did the Court adequately instruct the jury on this point at all; in fact, the Court failed to attempt to correct the matter in any fashion whatsoever.

This Court has already passed on this precise error in *Smith v. United States* (C.A. 9th, 1959), 268 F. 2d 416. Smith was a co-defendant of appellants here, but his appeal come on to be heard much earlier because the trial Court kept under consideration a motion for judgment of acquittal on behalf of the present appellants. In considering the appeal of Smith, this Court said:

> "Error is also predicated upon the failure of the court to make plain to the jury, by admonition to the United States Attorney or specific instruction to the jury, that a defendant is not required to produce evidence against himself or in his defense, and that the failure of the defendant to testify cannot be commented upon or referred to in argument."

Continuing, the Court said:

"While there was a general instruction, buried among the rest that defendants had a right to elect not to take the witness stand and that the jury should draw no unfavorable inference against them on that account, this instruction was not sufficiently connected nor sufficiently forceful to overcome the reference by the prosecuting attorney to defendants and their failure to rebut the evidence against them. Wilson v. United States, 149 U.S. 60.

In Bruno v. United States, 308 U.S. 287, 292-293, it was said: 'The accused could "at his own request but not otherwise be a competent witness. And his failure to make such a request shall not create any presumption against him." Such was the command of the law-makers. The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts.'

In Langford v. United States, 9 Cir., 178 F. 2d 48, the prosecuting attorney improperly drew the attention of the jury to the failure of defendant to take the stand not once but twice. At no time did counsel for the defense except to the comments of the prosecutor. On the second occasion, the court itself interposed and told the jury to disregard the comments of the government. Bruno v. United States, supra, was distinguished in that no instruction was requested correctly stating the right of the accused not to take the stand. Since exception was not taken and it did

not appear, in view of all the circumstances of the case, that defendant was sufficiently prejudiced to require the court to take notice of the remarks of the prosecutor as plain error, the verdict below was allowed to stand. The court stated in passing that: 'Had defendant saved the point by proper objection, the instructions given would not have cured the error. But again, when given an opportunity to make their objections to the charge as given, before the jury retired, counsel for defendant stated none.' Page 55."

The Court concluded:

"This court is of the opinion that these two failures of the court to instruct when the matter was called to its attention constitute, under the situation in this case, reversible error."

We submit that the conclusion of the Court was proper and that it is as applicable to Ing and Wright as it was to Smith.

CONCLUSION.

The errors complained of in these appeals are such as require reversal of the judgments below, and the granting of judgments of acquittal.

The testimony of the accomplices was completely uncorroborated. Under Alaska law, therefore, convictions based on such evidence cannot be allowed to stand.

The United States Attorney and the Court erred in their handling of comments made to the jury by the

United States Attorney concerning the failure of the defendants to testify.

Because of these errors, the judgments should be reversed.

Dated, Anchorage, Alaska,
October 28, 1959.

Respectfully submitted,
WENDELL P. KAY,
Attorney for Appellants.